In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-982

LAWRENCE ROSENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1972. A petition for rehearing was denied on December 13, 1972 (Pet. App. B). The petition for a writ of certiorari was filed on January 12, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, it was proper to use an informant as a government witness despite his acknowledged bad character.

2. Whether the prosecution was improperly permitted to proceed on a multiple-count indictment.

STATEMENT

After a trial to the court in the United States District Court for the Northern District of Illinois, petitioner was convicted on eleven counts charging interstate fraud and conspiracy in violation of 18 U.S.C. 1341, 1343, 2314, and 371. He was sentenced to concurrent terms of three years' imprisonment (C. 10).[1] The court of appeals affirmed *per curiam* (Pet. App. A).

Petitioner and a co-defendant, Joseph Stein,[2] together conducted a loan brokerage business in Chicago. Stein solicited advance fees from prospective borrowers, and petitioner "packaged" the loans, preparing documentation of the client's financial position. They then presented the client with a loan commitment, typically from Church of Christ Manors, Inc., with the understanding that the fee would be returned if interim financing could not be secured. Failing to find a bank willing to make the loan on the basis of the commitment, the client would return to petitioner and Stein, demanding either a loan or a refund of his advance fee. After stalling the client for as long as possible, petitioner and Stein would declare that

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[1] "C." refers to the Certified Record on Appeal, "Tr." to the trial transcript, and "H." to the transcript of the hearing on pre-trial motions. Each is on file with the Clerk of this Court.

[2] Stein was granted a severance after pleading guilty to two counts of the indictment (C. 6).

all or most of the fee had been spent in seeking the loan. Petitioner conceded that the brokerage service was a fraud and stipulated that $143,581.20 had been collected in advance fees which were never refunded (Pet. App. A 2).

Several former clients of the enterprise made depositions which were received in evidence by stipulation. These tended to establish that the clients had been unable to obtain funding for loans negotiated with Stein, and that during the negotiations or while seeking refunds of their advance fees, they had spoken on one or more occasions with petitioner (C. 343-344, 371-374). Others testified at trial. Sam Sarcinelli stated that during a meeting in petitioner's office at which petitioner and Stein were present, he had purchased bonds from men introduced to him as Kelly and Cooper. He had stopped payment on his check the following day, when he learned the bonds were fraudulent (Tr. 161-164). An investigator for the State Department of Insurance interviewed petitioner and Stein together concerning Kelly. Stein said there had been only one transaction with Kelly, involving a bond issued to one Keith Jones. He did not mention Sarcinelli or other purchasers (Tr. 186-188). Ernest Donnell testified that he had gone to Chicago because petitioner promised him that his loan could be closed immediately. He never received the loan or a refund of his advance fee (Tr. 358-362). Floren Klopfenstein paid a $20,000 finder's fee after petitioner and Stein claimed authority from Church of Christ Manors to issue loan commitments. He contended that his financial position had been fully disclosed to Stein (Tr. 236-243). He was unable to obtain funding and made numerous calls to petitioner, who always stalled him. He eventually received a refund of $1,000 (Tr. 251-252).

John Rimanich, testifying on behalf of the government, stated that he had met petitioner in 1966 in the Cook County Jail. Petitioner told him that he, Joseph Stein, and two others were engaged in a loan brokerage business, the purpose of which was to exact finder's fees from clients seeking loans. The loans were seldom made, but the fees were retained (Tr. 8-10, 49). When Rimanich was released in 1968, he saw petitioner, who said that he and Stein had gone into the loan business for themselves. At petitioner's request, Rimanich began frequenting their office (Tr. 11-14). In January 1969, petitioner told Rimanich that two men, Kelly and Cooper, were promoting bonds which appeared to have great profit potential. Soon, however, it was learned that the bonds were fraudulent and would not withstand verification, so that their usefulness was diminished (Tr. 19-22). Rimanich accompanied petitioner to O'Hare Airport to pick up Stein, who was expected to return from Florida with $100,000 in profits from the Kelly-Cooper bonds. When Stein appeared, however, he said that he had left Florida in haste when his client attempted to verify the bonds' authenticity (Tr. 24-26).

On cross-examination, Rimanich stated that he had frequented the office for a period of six months, using it as a base for his activities, which included posing as an attorney, soliciting clients for various lawyers, and robbing banks (Tr. 55-56, 72-73). During a time when numerous federal and state charges were pending against him in connection with four bank robberies, he began to provide information to federal officials (Tr. 120, 131). He had testified for the government in a robbery case prior to petitioner's trial (Tr. 83). The Assistant United States Attorney refused to make any promises in exchange for the testimony and a plea of guilty to one

robbery charge, except that the sentencing judge would be advised of his cooperation, and that he would not be incarcerated in the same penitentiary as anyone against whom he had testified (Tr. 78-79). The government refused to promise not to seek further indictments against him (Tr. 86). Rimanich was sentenced to five years' probation under the supervision of the United States Attorney (Tr. 74-75, 124). He received $500 with which to relocate (Tr. 127).

Petitioner, who testified that he holds a college degree in business administration (Tr. 439), met Stein late in 1961. The following year, the two began meeting socially and discussing their common business interests (Tr. 434-435). In mid-1963, petitioner went to work for Stein and his partners, Phil Alderisio and Leonard Stallman, "packaging" loans (Tr. 436-437). He remained there until 1966, when he spent several weeks in jail (Tr. 439-440). In 1968, he went to work for Stein only, being compensated on a "per deal" basis; they worked together until 1970, when the indictment was returned (Tr. 450). Petitioner disclaimed any proprietary interest in the business prior to January 1, 1970, when a corporation was formed and petitioner became its president (Tr. 498-499). He admitted his participation in the transactions detailed in the testimony of other witnesses, but denied practicing any fraud and claimed that he had not known until many months later that refunds had not been received (Tr. 580, 591-594, 621). He contended that Klopfenstein had grossly misrepresented his financial position and that petitioner had continued to work on the transaction for several months while unaware that Klopfenstein had demanded a refund for his advance fee (Tr. 612-628). Petitioner recalled meeting Rimanich in jail, where they became friendly. Petitioner said he had capitalized on the

notoriety achieved through his connection with Phil Alderisio, and Rimanich did favors for him (Tr. 450-453).

On cross-examination, petitioner conceded that, while working for Stein between 1963 and 1966, he was aware that clients were delayed in obtaining loans or refunds on their advance fees. He also knew that on at least one or two occasions between 1961 and 1966 Stein was arrested on fraud charges on the complaint of clients. Shortly after becoming reassociated with Stein in 1968, petitioner learned that Stein had been indicted in California on fraud charges. He knew also that Stein had been sued by clients. Between 1968 and 1970, petitioner received at least a dozen calls from clients seeking refunds (Tr. 651-671). However, petitioner stated that, between January 1970 and the return of the indictment the following summer, he had sent out more than $100,000 in refunds. He claimed that he had never lied to a client; nor had anyone lied to a customer in his presence (Tr. 687-688).

ARGUMENT

1. Petitioner contends that the government, as a matter of public policy, should be prevented from proving white-collar crimes with the testimony of unrepentant bank robbers. First, we note that petitioner did not object at trial to the use of Rimanich as a witness. Furthermore, this Court has made it clear that a witness's bad character presents only a question of credibility, to be determined by the trier of fact, and not a question of testimonial competence. *Glasser* v. *United States,* 315 U.S. 60, 77. The government and the public ought not to be penalized for the morals of prosecution witnesses. The proper solution, instead, is to permit the defendant broad latitude in cross-examination. *On Lee* v. *United States,* 343 U.S. 747, 757. Other courts dealing with a similar situation

have agreed that the credibility of a criminal or a person of low character and the weight to be accorded to his testimony are within the exclusive province of the trier of fact. *United States* v. *Henderson*, 422 F. 2d 454 (C.A. 9); *Puentes* v. *United States*, 319 F. 2d 581 (C.A. 5); *United States* v. *Vittoria*, 284 F. 2d 451, 454 (C.A. 7). Here, petitioner's attorney was permitted to inquire extensively into Rimanich's background; the cross-examination of this witness consumes approximately one hundred pages of the trial transcript.

Moreover, contrary to petitioner's contention (Pet. 15), he was not convicted upon the testimony of the informer. As petitioner notes (Pet. 14), the trial court found the testimony of Rimanich "suspect" and concluded that it alone would be insufficient to support a conviction. But the court stated that "it does not take the testimony of Rimanich to establish" that petitioner was willfully involved in the fraudulent scheme (Pet. App. A 4-5, n. 2). As heretofore described, the government presented substantial evidence aside from the testimony of Rimanich. Indeed, petitioner's own testimony established that he knew of Stein's past participation in fraudulent loan brokerage; he also conceded the occurrence of the transactions upon which the indictment was based and Stein's fraud in regard to them, although he contended that his own actions and motives were innocent. If the trier of fact disbelieved petitioner's interpretation of the events, he could have found petitioner guilty, even disregarding the Rimanich testimony.[3] In any event, as the court of appeals pointed out, the testimony was not wholly disregarded by the district court. A remark that testimony is "suspect"

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[3] In passing on the sufficiency of the evidence, the court of appeals found that it sufficed even without the testimony of Rimanich (Pet. App. A 5).

is not an expression of complete rejection. It goes, rather, to the weight of the evidence. *United States* v. *Miles*, 401 F. 2d 65, 67 (C.A. 7). The trial court here, after studying all of the evidence, was convinced beyond a reasonable doubt that petitioner was guilty of the crimes charged in the indictment. Viewing the evidence most favorably to the government, the verdict is clearly supported and must be sustained. *Glasser* v. *United States, supra*, 315 U.S. at 80; *United States* v. *Lowery*, 306 F. 2d 133, 135 (C.A. 4).

2. Petitioner also contends that the government should not have been permitted to proceed on a multiple-count indictment. Petitioner's pre-trial motion to require election of counts was denied because the court found no multiplicity on the face of the indictment (H. 16). Moreover, Rule 8(a) of the Federal Rules of Criminal Procedure expressly sanctions the type of indictment used here, providing in pertinent part:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged * * *are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Here, the ten substantive counts of the indictment which named petitioner alleged ten separate acts involving the violation of three federal statutes on eight different dates by various uses of the mails, telephone, telegraph, and interstate transportation. Each act was thus a separate crime. See *Gore* v. *United States*, 357 U.S. 386, 389. Multiplicity results from charging one offense in two or more counts. It is not present where each count charges, and the evidence shows, a distinct violation of law. *United States* v. *Addonizio*, 451 F. 2d 49, 60 (C.A. 3),

certiorari denied, 405 U.S. 936; *United States* v. *Brandom*, 320 F. Supp. 520, 525 (W.D. Mo.). In fact, had any of these discrete offenses been joined in a single count, petitioner could have claimed that the indictment was duplicitous.

It has been recognized that multiplicity can result in a psychological suggestion to the jury that a larger number of crimes are involved than are actually charged. *United States* v. *Ketchum*, 320 F. 2d 3, 8 (C.A. 2), certiorari denied, 375 U.S. 905. This danger, of course, is not present where the trial is to the court, as it was here.

Petitioner implies that the government hoped that, by joining multiple counts in the indictment, it might create a "pattern of guilt" without specific proof on one or more counts. That the prosecution had no such purpose is demonstrated by the fact that two substantive counts were dismissed during the trial on application of the government for the reason that the evidence did not establish petitioner's guilt on those counts (C. 9). The indictment was lengthy and detailed (C. 13-48), and we submit that the experienced trial judge had no difficulty in determining whether the government had sustained its burden of proof on each count.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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